

C O M M E N T

ANALYSIS OF ENVIRONMENTAL LAW SCHOLARSHIP 2022-2023

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The *Environmental Law and Policy Annual Review* (ELPAR) is published by the Environmental Law Institute's (ELI's) *Environmental Law Reporter* in partnership with Vanderbilt University Law School. ELPAR provides a forum for the presentation and discussion of some of the most creative and feasible environmental law and policy proposals from the legal academic literature each year. The articles that are considered include all environmental law articles published in select law journals during the previous academic year.¹ The law journal articles that are republished and discussed are selected by Vanderbilt University Law School students with input from their course instructors and an outside advisory committee of experts.

The purpose of this Comment is to highlight the results of the ELPAR article selection process and to report on the environmental legal scholarship for the 2022-2023 academic year, including the number of environmental law articles published in general-interest law reviews versus environment-focused law journals and the topics covered in these articles. We also present the top 20 articles that meet ELPAR's criteria of persuasiveness, impact, feasibility, and creativity. From the top 20 articles, we selected four articles to be republished in shortened form in this issue, including some with commentaries from leading practitioners and policymakers. This Comment provides an empirical snapshot of the environmental legal literature during the past academic year and provides information on the top articles chosen by ELPAR.

1. See *ELPAR Publications*, ENV'T L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited June 20, 2024) [hereinafter *ELPAR Methodology*] (click on the "Methodology" button near the top of the page).

I. Methodology

A detailed description of ELPAR's methodology is posted on the ELI website.² In brief, the initial search for scholarship that qualifies for ELPAR review is limited to articles published from August 1 of the prior year to July 31 of the current year, roughly corresponding to the academic year. The search is conducted in general law reviews from the top 100 law schools, as ranked by *U.S. News and World Report* in its most recent report, counting only articles from the first 100 schools ranked for data purposes (i.e., if there is a tie and over 100 schools are considered to be in the top 100, among schools at the cutoff, those that come first alphabetically are counted). Additionally, journals listed in the "Environment and Land Use Law" and "Energy and Natural Resources Law" subject areas of the most recent journal rankings compiled by Washington & Lee University School of Law are searched,³ with certain modifications.⁴

The ELPAR Editorial Board and staff start with a keyword search for "environment!" in an electronic legal scholarship database.⁵ Articles without a connection to the

2. *Id.*

3. *W&L Law Journal Rankings*, WASH. & LEE SCH. OF L., <https://management-tools4.wlu.edu/LawJournals/> (last visited June 20, 2024) (select a category in the "Subject" dropdown menu, then click "Submit").

4. See *ELPAR Methodology*, *supra* note 1.

5. ELPAR members conduct a search in the spring semester of articles published from August 1 through December 31 of the previous year. In the fall semester, members search each journal for articles published earlier that year, from January 1 through July 31. The exact date of access for each journal varies according to when each individual ELPAR member performed the searches on their assigned journals, but the spring searches were performed in the second and third weeks of January 2023, and the fall searches were performed in the last full week of August 2023. In order to collect articles from "embargoed" journals (which are only available on Westlaw after a delay) as well as articles from journals that are published after their official publication date, a Westlaw Alert is set up to provide notification when an

natural environment (e.g., “work environment” or “political environment”) are removed, as are book reviews, eulogies, non-substantive symposia introductions, case studies, presentation transcripts, and editors’ notes. Student scholarship is excluded if the piece is published as a note or comment by a student who is a member of the staff of the publishing journal. We recognize that all ranking systems have shortcomings and that only examining top journals imposes limitations on the value of our results. Nevertheless, this approach provides a useful glimpse of leading scholarship in the field.

For purposes of tracking trends in environmental scholarship, the next step is to cull the list generated from the initial search to ensure that the list contains only those articles that qualify as “environmental law articles.” Determining whether an article qualifies as an environmental law article is more of an art than a science, and our conclusions should be interpreted with this caveat in mind. We have, however, attempted to use a rigorous, transparent process. Specifically, an article is considered an “environmental law article” if environmental law and policy are a substantial focus of the article. The article need not focus exclusively on environmental law, but environmental topics should be given more than incidental treatment and should be integral to the main thrust of the article. Many articles in the initial pool, for example, address subjects that influence environmental law, including administrative law topics (e.g., executive power and standing) and tort law topics (e.g., punitive damages). Although these articles may be considered for inclusion in ELPAR and may appear in our selection of top articles, they are not included for purposes of tracking environmental law scholarship since environmental law is not the main thrust of these articles.

Each article in the dataset is categorized by environmental topic to allow for tracking of scholarship by topic area. The 10 topic categories are adopted from the *Environmental Law Reporter* subject matter index and consist of air, climate change, energy, governance, land use, natural resources, toxic substances, waste, water, and wildlife.⁶ ELPAR students assign each article a primary topic category and, if appropriate, a secondary category. ELPAR students also assign each article a sub-category if appropriate.⁷

article meeting ELPAR’s search criteria is uploaded to Westlaw after ELPAR members conducted initial searches. A Westlaw Alert was set up for the spring search on January 11, 2023, and ran until August 22, 2023. An alert was set up for the fall search on August 23, 2023, and ran until August 31, 2023. Articles caught by the Westlaw Alert system were subsequently considered for selection by ELPAR and added to the data analysis. Law reviews of schools added to the *U.S. News and World Report* top 100 during the spring search are searched for the entire year the following fall, and journals from schools removed from the top 100 after the spring search are removed and not considered.

6. *Subject Matter Index (Articles)*, ELR, <https://www.elr.info/subject-matter-index/articles> (last visited June 20, 2024).

7. The *ELR* subject matter index includes subtopics for each topic. For example, subtopics for the governance topic consist of administrative law, agencies, bankruptcy, constitutional law, courts, enforcement and compliance, environmental justice, environmental law and policy/governance, infrastructure, institutional controls, insurance, international, liability, private governance, public participation, risk assessment, states, sustainability, tax, trade, tribes, and U.S. government. For a list of all the subtop-

The ELPAR Editorial Board and staff work in consultation with the course instructors, Prof. Michael P. Vandenberg and ELI Senior Attorney Linda K. Breggin, to determine whether articles should be considered environmental law articles and how to categorize the article by environmental topic for purposes of tracking scholarship. The articles included in the total for each year are identified on a list posted on the Environmental Law Institute website.⁸

II. Data Analysis of Environmental Legal Scholarship

For the 2022-2023 ELPAR review period (August 1, 2022 through July 31, 2023), the ELPAR Editorial Board and staff identified 300 environmental articles published in top law reviews and environmental law journals. One hundred eighty-one were published in journals that focus on environmental law, and 119 were published in general law reviews.

Aggregate data on the articles’ primary topics are displayed in Figure 1 below. Of the 300 environmental articles published during the 2022-2023 review period, there are 132 governance articles (44.0%), 32 climate change articles (10.7%), 30 energy articles (10.0%), 26 land use articles (8.7%), 25 water articles (8.3%), 14 natural resource articles (4.7%), 13 wildlife articles (4.3%), 13 toxic substances articles (4.3%), 10 waste articles (3.3%), and five air articles (1.7%). ELPAR members additionally identified secondary topics in 176 articles; these data can be seen in Figure 2 below. Among the articles identified as having a secondary topic, the secondary topic is governance in 76 articles, climate change in 40 articles, land use in 15 articles, natural resources in 11 articles, water in eight articles, energy in seven articles, wildlife in six articles, air in five articles, waste in five articles, and toxic substances in three articles. Governance is the most common topic, followed by climate change and land use. Figure 3 shows the breakdown of articles with governance as a primary or secondary topic further categorized by their governance subtopic, demonstrating the wide variety of governance subject areas observed.

III. Top 20 Articles Analysis

The top 20 articles chosen from the pool of eligible environmental law and policy-related articles published during the 2022-2023 academic year are listed in Table 1. Of the top 20 articles outlined below, seven proposed that federal agencies promulgate new or updated regulations, four proposed updates to federal laws, four proposed state or local policy approaches, three proposed changes in the judicial system or new interpretations of existing law, and two proposed private environmental governance solutions. Many proposals incor-

ics in each topic, see *id.* (click on one of the listed topics to view related sub-topics therein).

8. See *ELPAR Publications*, ENV’T L. INST., <https://www.eli.org/environmental-law-policy-annual-review/publications> (last visited June 20, 2024) (click on the “Environmental Law and Policy Annual Review Complete List of Reviewed Articles 2022-2023” button near the top of the page).

porated federal, state and local, and private-sector actions as a means of addressing environmental issues.

Primary topics identified in the top 20 articles are as follows: seven climate change articles, five governance articles, two water articles, two natural resources articles, two land use articles, one energy article, and one toxic substances article. Secondary topics were also identified for several articles; these include 11 governance and two natural resources articles.

This year’s pool of top articles came from both general and environmental law journals. Sixteen of the top 20 articles were published in general-subject law journals, while

four were published in environmental law reviews. The lead authors of the top articles came from a wide range of law schools and academic backgrounds.

Table 1 below lists every article included in the top 20 along with a brief description of each article’s main takeaway or “big idea.” The descriptions of the big ideas were drafted by the ELPAR Editorial Board and staff and reflect the key points they thought made an important contribution to the environmental law and policy literature. Links are provided to free-to-access versions of the full articles, and most of the articles include a brief abstract summarizing the piece.

Figure 1. 2022-2023 Articles Categorized by Primary Topic

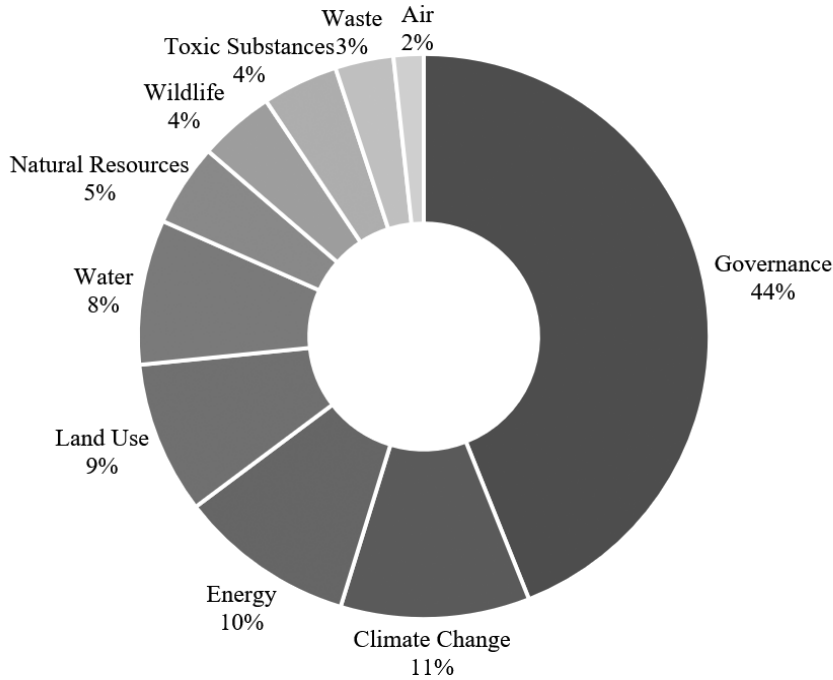


Figure 2. 2022-2023 Article Count by Primary and Secondary Topic

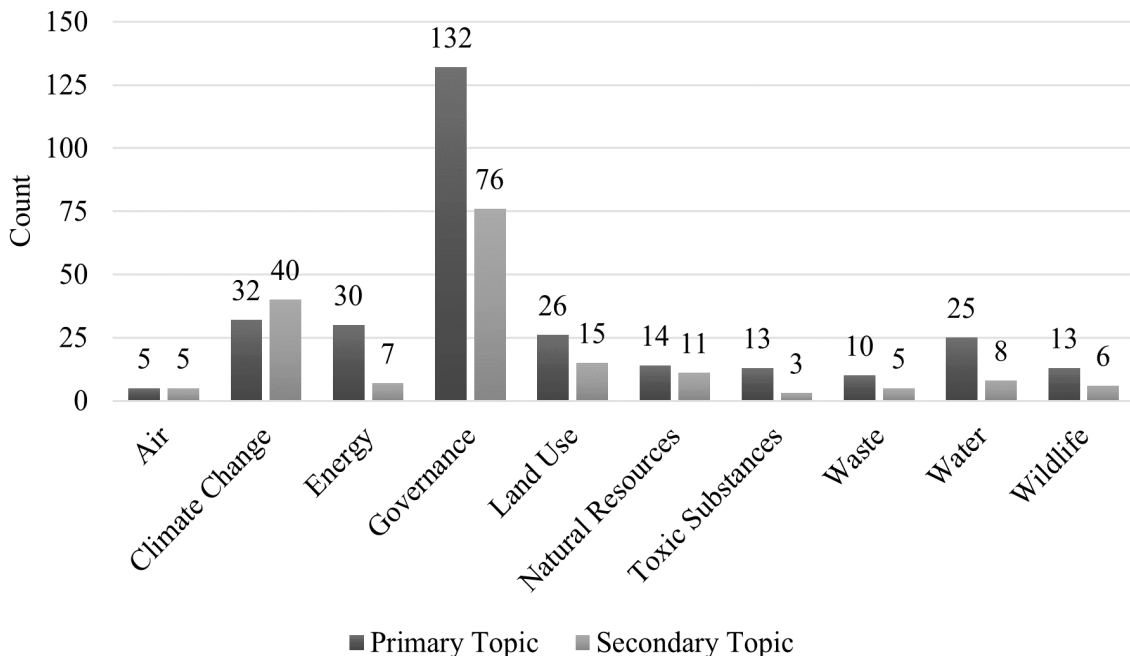


Figure 3. 2022-2023 Governance Articles Categorized by Sub-Topic

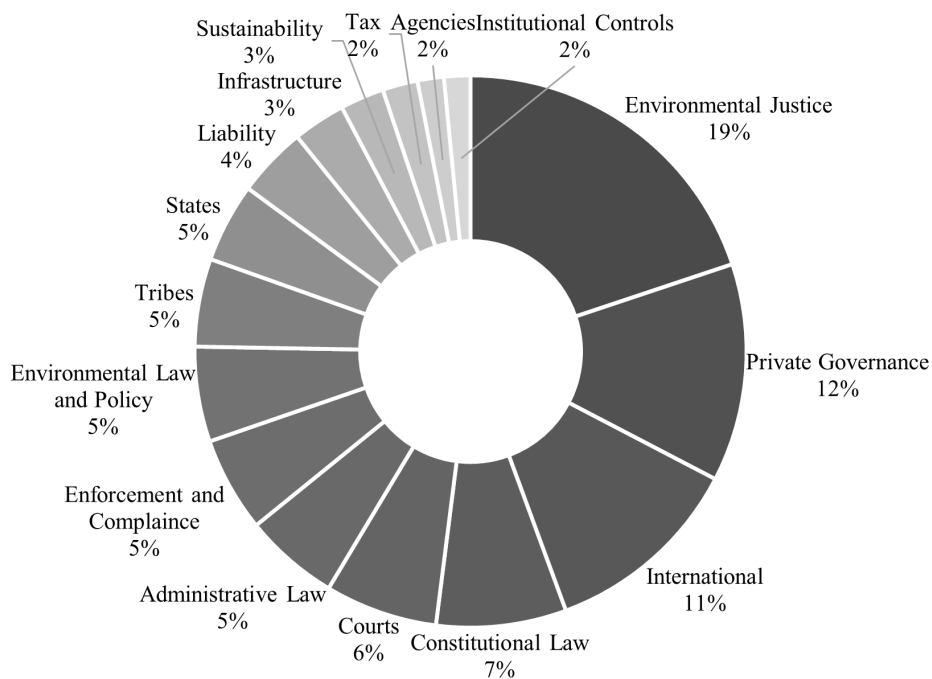


Table 1. 2022-2023 Top 20 Articles Overview Chart

| Author(s) | Title | Citation and URL | Topic | The Big Idea |
|---|--|---|---|--|
| Anderson, Jerry L. Vaughan, Amy Grace | <i>Environmental Penalties: Discretion and Disparity</i> | 42 STAN. ENV'T L.J. 3 https://law.stanford.edu/wp-content/uploads/2023/02/1_Anderson-Vaughan_web_2-20.pdf | Governance (enforcement and compliance) | U.S. Environmental Protection Agency (EPA) data demonstrate wide disparities in median penalties imposed for violations of federal environmental laws—including from state-to-state, between states and EPA, and among EPA regional offices—and this lack of uniformity should be addressed through a range of regulatory, policy, and judicial reforms that would promote deterrence and fairness while also preserving enforcement discretion. |
| Angelo, Mary Jane Lancaster, Megan | <i>The Insect Apocalypse: Legal Solutions for Protecting Life on Earth</i> | 49 ECOLOGY L.Q. 1 https://www.ecologylaw-quarterly.org/wp-content/uploads/2022/10/49.1_Angelo_Lancaster-1.pdf | Toxic Substances (pesticides) | The U.S. Environmental Protection Agency should change its interpretation and application of the Federal Insecticide, Fungicide, and Rodenticide Act by: (1) requiring more robust data on the risks and benefits of a pesticide to support its evaluation of environmental, economic, and social considerations; (2) exercising discretion to ensure imperiled species and ecosystem services are given the weight they deserve; (3) considering integrated pest management techniques as alternatives; (4) eliminating the treated article exemption for seeds treated with systemic insecticides to allow for enforceable warnings and risk reduction language on labels; and (5) including label restrictions on pesticides that require insecticide-free on-farm habitats to be maintained. |
| Börk, Karrigan | <i>Water Right Exactions</i> | 47 HARV. ENV'T L. REV. 63 https://journals.law.harvard.edu/elr/wp-content/uploads/sites/79/2023/04/HELR-Vol.-47.1-Bork.pdf | Water (quantity) | Permitting entities should impose exactions directly on new and existing water right holders to offset the external costs associated with water rights and associated infrastructure, thereby internalizing costs and encouraging more rational water use, improved efficiency, and better maximization of the societal benefits of water use. |
| Brewster, Rachel | <i>Enabling ESG Accountability: Focusing on the Corporate Enterprise</i> | 2022 WIS. L. REV. 1367 https://wlr.law.wisc.edu/wp-content/uploads/sites/1263/2023/01/14-A_Brewster-Camera-Ready-1367%E2%80%931406-PDF-.pdf | Governance (private governance) | Congress should pass legislation that reshapes corporate enterprise law to increase parent corporations' responsibilities to supervise their subsidiaries through a set of ground rules for all corporations and, in so doing, empower corporate leaders who want to achieve environmental, social, and governance goals. |

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| Cecot, Caroline | <i>Efficiency and Equity in Regulation</i> | 76 VAND. L. REV. 361 https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=4844&context=vlr | Governance (administrative law) | Understanding distributional effects and considering equity in regulation is long overdue but is not inconsistent with and should not displace cost benefit analysis, efficiency, or economic thinking—and when equity and efficiency conflict, the following rules of thumb should be used to determine whether and how funding and subsidy programs should be deployed to achieve equitable outcomes: (1) agency action should not leave society, in the aggregate, worse off; and (2) agency action should avoid leaving disadvantaged groups worse off, especially in the context of pursuing equality in regulatory benefits. |
| Diamond, Danielle Ashwood, Loka Franco, Allen Kuehn, Lindsay Implay, Aimee Boutwell, Crystal | <i>Agricultural Exceptionalism, Environmental Injustice, and U.S. Right-to-Farm Laws</i> | 52 ELR 10727 https://animal.law.harvard.edu/wp-content/uploads/Diamond.pdf | Land Use (agriculture)/ Governance (liability) | States should repeal right-to-farm laws (RTFLs) and allow common-law nuisance doctrine to evolve because RTFLs enable industrial agribusiness to evade accountability while harming small and medium farmers and rural communities, and the outcomes are inconsistent with the fundamental purpose of the laws and enable rural environmental injustices. |
| Dominioni, Goran Esty, Daniel C. | <i>Designing Effective Border Carbon Adjustment Mechanisms: Aligning the Global Trade and Climate Change Regimes</i> | 65 ARIZ. L. REV. 1 https://arizonalawreview.org/pdf/65-1/65arizrev1.pdf | Climate Change/Governance (trade) | To prevent carbon leakage, protect domestic industries, and incentivize collective climate action, border carbon adjustment (BCA) mechanisms, which assess the carbon emissions embedded in imported products and impose a tariff on imports from countries with less ambitious climate policies, are needed, and they should take the form of “effective” BCA mechanisms, which credit a wide range of climate policies in order to yield greater emissions reductions globally, garner broader political support, and sync with World Trade Organization law, as compared to explicit BCA mechanisms, which only credit carbon taxes and emission trading schemes. |
| Gouzoules, Alexander | <i>Going Concerns and Environmental Concerns: Mitigating Climate Change Through Bankruptcy Reform</i> | 63 B.C. L. REV. 2169 https://lira.bc.edu/work/ns/a9230b7f-58ad-43e4-98b8-26aa64a8bf1a | Climate Change/Governance (bankruptcy) | To mitigate climate change and speed the adoption of renewable energy, Congress should amend the Bankruptcy Code to: mandate liquidation under Chapter 7 of certain types of insolvent fossil in lieu of reorganization under Chapter 11; require courts and trustees to consider climate change mitigation, including through decreasing emissions from fossil fuel production, when considering the public interest; and provide for appointment of environmental trustees to weigh the interests of creditors against the public interest in climate change mitigation. |
| Hirokawa, Keith H. Carlarne, Cinnamon P. Börk, Karrigan S. Ziaja, Sonya | <i>Mapping Ecosystem Benefit Flows to Normalize Equity</i> | 54 ARIZ. ST. L.J. 819 https://arizonastatelawjournal.org/wp-content/uploads/2023/02/Bork_-Publication.pdf | Natural Resources/ Governance (environmental justice) | Mapping ecosystem services benefit flows can provide critical information about resource distribution, access, and control that should be used to promote equitable outcomes in land use planning, exactions that consider ecosystems services impacts, environmental justice mappings, and environmental impact statements under state and federal law. |
| Martinez, Veronica Root | <i>Public Reporting of Monitoring Outcomes</i> | 136 HARV. L. REV. 757 https://harvardlawreview.org/wp-content/uploads/2023/01/136-Harv.-L.-Rev.-757.pdf | Governance (enforcement and compliance) | To increase transparency, at the conclusion of all corporate monitorships, the public should receive a report outlining whether the company engaged in a successful remediation effort, and this requirement can be achieved through: (1) a U.S. Securities and Exchange Commission periodic disclosure requirement; and (2) a new Office of Management and Budget policy. |
| Mormann, Felix | <i>Climate Choice Architecture</i> | 64 B.C. L. REV. 1 https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=2666&context=facscholar | Climate Change/Governance (private governance) | A greater reliance on nudges in both public and private governance would lead to more climate-friendly decisions by institutions and individuals across a wide range of contexts, and policymakers and practitioners should adopt a functionally derived taxonomy that groups the tools of choice architecture into three categories—decision information, decision structure, and decision assistance—to help them identify the type of nudges that best advance their climate objectives. |

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| <p>Ochoa, Christiana Cook, Kacey Weil, Hanna</p> | <p><i>Deals in the Heartland: Renewable Energy Projects, Local Resistance, and How Law Can Help</i></p> | <p>107 MINN. L. REV. 1055 https://minnesotalawreview.org/wp-content/uploads/2023/01/02-Ochoa_MLR.pdf</p> | <p>Energy (alternative energy)/ Governance (public participation)</p> | <p>The U.S.' transition to renewable energy depends on the consent of increasingly reluctant rural communities to host wind farms, and, therefore, the following empirically informed measures should be adopted by private parties and governments: publicly acknowledge the burden wind turbines place on communities; improve the project design process (by registering interest and reporting on progress, inviting engagement and participation, fostering robust sharing of information, and allowing opportunities for fully voicing concerns); and assure that local communities receive financial benefits such as permanent fund dividends and grants.</p> |
| <p>Okoh, Michele</p> | <p><i>Forgotten Waters</i></p> | <p>111 GEO. L.J. 723 https://www.law.georgetown.edu/georgetown-law-journal/wp-content/uploads/sites/26/2023/06/GT-GGLJ230013.pdf</p> | <p>Water (Safe Drinking Water Act)/Governance (environmental justice)</p> | <p>To address historical discrimination against "peri-urban" communities (i.e., unincorporated communities proximate to municipalities that typically house poor, majority-minority populations) and the concomitant lack of water quality, Congress should utilize the cooperative model embodied in the Rural Electrification Act to affordably subsidize the inclusion of these well-dependent peri-urban communities into bordering municipalities' existing public water systems, providing residents with regulatory protection under the Safe Drinking Water Act.</p> |
| <p>Owen, Dave</p> | <p><i>The Negotiable Implementation of Environmental Law</i></p> | <p>75 STAN. L. REV. 137 https://review.law.stanford.edu/wp-content/uploads/sites/3/2023/01/Owen-75-Stan.-L.-Rev.-137.pdf</p> | <p>Governance (enforcement and compliance)</p> | <p>Contrary to conventional accounts, negotiation is a pervasive feature of environmental law implementation and, therefore, regulatory agencies should "enhance and channel" negotiation-based systems through reforms to: (1) increase transparency by revising regulations, handbooks, and guidance documents to specify negotiable terms and limitations and disclose outcomes of negotiations where possible; (2) foster efficiency by dedicating additional resources to negotiation training; and (3) advance equity by providing funding and technical support to community groups.</p> |
| <p>Regan, Shawn Stoellinger, Temple Wood, Jonathan</p> | <p><i>Opening the Range: Reforms to Allow Markets for Voluntary Conservation on Federal Grazing Lands</i></p> | <p>2023 UTAH L. REV. 197 https://dc.law.utah.edu/cgi/viewcontent.cgi?article=1344&context=ulr</p> | <p>Land Use (public lands)/ Natural Resources</p> | <p>To overcome federal legal and institutional barriers that preclude markets for voluntary conservation on federal grazing lands, Congress and federal agencies could adopt a range of legislative and administrative reforms to: (1) rescind substantial grazing use regulations; (2) maximize flexibility under outcome-based grazing authorizations; (3) authorize conservation use; (4) remove requirements to own livestock and base property; (5) grant agencies administrative retirement authority; (6) recognize grazing privileges as formal property rights; (7) expand targeted regional approaches to resolve specific conflicts; and (8) use exchange authorities to facilitate voluntary conservation transactions.</p> |
| <p>Rossi, Jim Ruhl, J.B.</p> | <p><i>Adapting Private Law for Climate Change Adaptation</i></p> | <p>76 VAND. L. REV. 827 https://scholarship.law.vanderbilt.edu/cgi/viewcontent.cgi?article=4850&context=vlr</p> | <p>Climate Change/Governance (courts)</p> | <p>Private law (torts, property, and contracts) will play an increasingly important role in solving disputes stemming from efforts to adapt to climate change, and several guideposts should be used to evaluate when doctrinal changes may be needed, such as modifying the central principle of "foreseeability" which, given the increasing inability to predict the future based on prior data, should incorporate a "foreseeability of nonstationarity" principle that may expand the scope of private law climate adaptation obligations.</p> |

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| <p>Ryan, Erin</p> | <p><i>Privatization, Public Commons, and the Takingsification of Environmental Law</i></p> | <p>171 U. PA. L. REV. 617</p> <p>https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=9807&context=penn_law_review#:~:text=Binding%20environmental%20policy-making%20discretion%20through,conservation%20oriented%20leadership%20takes%20office</p> | <p>Natural Resources/ Governance (constitutional law)</p> | <p>Courts should adopt a modified regulatory takings test for public commons (i.e., air, water, public lands, energy, and biodiversity resources) based on a set of narrowly tailored changes to existing “legal infrastructure,” including modest adjustments to the three prongs of the Penn Central test, in order to better account for the balance between public and private interests—a necessary step in light of the increasing “takingsification” of environmental law whereby property rights become a tool for entrenching environmental deregulation and undermining public rights in natural resource commons.</p> |
| <p>Sassman, Wyatt G</p> | <p><i>Prioritizing Proximity in Phasing Out Oil and Gas Extraction</i></p> | <p>55 CONN. L. REV. 749</p> <p>https://digitalcommons.lib.uconn.edu/cgi/viewcontent.cgi?article=1569&context=law_review</p> | <p>Climate Change/Governance (environmental justice)</p> | <p>In phasing out oil and gas extraction to address climate change, policies should prioritize: (1) stopping new extraction closest to people; (2) monitoring continued extraction closest to people; (3) plugging and reclaiming wells closest to people; and (4) matching proximity-based phaseouts with decarbonization.</p> |
| <p>Stern, Stephanie M</p> | <p><i>Climate Transition Relief: Federal Buyouts for Underwater Homes</i></p> | <p>72 DUKE L.J. 161</p> <p>https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4132&context=dlj</p> | <p>Climate Change/Natural Resources (natural disasters)</p> | <p>Buyout laws and programs, such as the Federal Emergency Management Act’s Hazard Mitigation Grant Program, which funds government acquisitions of flood-impacted homes, are incentivizing “buy ins” to flood zones by subsidizing flood risk-taking and should instead adopt a “climate transition relief” model built on a presumption against homeowner buyouts to curb high-risk housing choices—but should also include a carve-out for low-income residents who face severely constrained housing choice, unaffordable flood insurance, and high marginal costs from property loss.</p> |
| <p>Welton, Shelley</p> | <p><i>Neutralizing the Atmosphere</i></p> | <p>132 YALE L.J. 171</p> <p>https://www.yalelawjournal.org/pdf/132.1_Welton_h5rtb5xy.pdf</p> | <p>Climate Change/Governance (environmental law and policy/governance)</p> | <p>The role of private companies in addressing climate change should be restructured away from net-zero targets and toward a “reduce and support” model in which companies commit to: (1) obtain an emissions-reduction goal; (2) declare any residual emissions; and (3) contribute to a global fund at a level commensurate with nonabateable emissions.</p> |